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## Dissent

Judge William A. Fletcher

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FEBRUARY 26, 2008

GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

## DISSENT

WILLIAM A. FLETCHER\*

Thank you, Professor Oppenheimer, for your generous introduction. Thank you also, Golden Gate Law School, for your invitation to participate in your lecture series on dissent. The series is in honor of your distinguished graduate, Justice Jesse Carter, who served on the California Supreme Court for twenty years, from 1939 to 1959.<sup>1</sup> He was known on that Court as the “great dissenter,” writing a total of 510 dissents, or an average of a little over twenty per year. At least three of those dissents were vindicated in the United States Supreme Court when that Court agreed with Justice Carter.<sup>2</sup>

Perhaps the most notable of these was Justice Carter’s 1947 dissent in *Takahashi v. Fish & Game Commission*,<sup>3</sup> in which the California Supreme Court held that the State of California could deny a commercial fishing license to Torao Takahashi. Takahashi was born in Japan and came to the United States as a legal immigrant in 1907. From 1915 to 1942, he was licensed as a commercial fisherman by the State of California. During World War II, Takahashi was interned by the federal government as an alien Japanese. Upon his release after the war,

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\*Judge, United States Court of Appeals for the Ninth Circuit.

<sup>1</sup> J. EDWARD JOHNSON, JUSTICES OF CALIFORNIA, 1900-1950, VOLUME II (1966), available at [http://www.ggu.edu/lawlibrary/jessecarter/biography/attachment/justices\\_of\\_california.pdf](http://www.ggu.edu/lawlibrary/jessecarter/biography/attachment/justices_of_california.pdf).

<sup>2</sup> In addition to the *Takahashi* dissent, they were *Garmon v. San Diego Bldg. Trades Council*, 291 P.2d 1 (Cal. 1955), vacated by 353 U.S. 26 (1957); *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 187 P.2d 729 (Cal. 1947), *rev’d*, 333 U.S. 821 (1948).

<sup>3</sup> *Takahashi v. Fish & Game Comm’n*, 185 P.2d 805, 816 (Cal. 1947) (Carter, J., dissenting), *rev’d*, 334 U.S. 410 (1948).

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Takahashi sought reissuance of his commercial fishing license.

In 1943, California had passed a statute prohibiting the issuance of a license to “any alien Japanese.” In 1945, in an attempt to insulate the statute from constitutional challenge, California amended it to prohibit, more broadly, the issuance of a license to any alien ineligible for citizenship. At that time, members of several racially defined groups, including Japanese, were ineligible under federal law for citizenship unless they were born in the United States. The 1945 amendment of the California statute thus had the consequence (as well as the intent) of continuing the prohibition of the issuance of licenses to alien Japanese. Justice Carter dissented from the holding of the California Supreme Court. He wrote:

[T]he statute not only discriminates against aliens solely on upon the basis of alienage but goes further and excludes only certain classes of aliens, namely, those who are ineligible for citizenship. . . . [I]nasmuch as the fishing involved is commercial fishing, an age-old means of livelihood, the issue is whether an alien resident may be excluded from engaging in a gainful occupation — from working — from making a living.

A mere statement of the problem should compel an answer favorable to the alien if there is any security in our constitutional guarantees.<sup>4</sup>

The United States Supreme Court agreed with Justice Carter, reversing the decision of the California Supreme Court in an opinion by Justice Black.<sup>5</sup> Justice Carter’s dissent in *Takahashi* on the California Supreme Court is an appropriate introduction to several famous dissents on the United States Supreme Court.

In the first, *Plessy v. Ferguson*,<sup>6</sup> the question was whether the State of Louisiana could require, by law, that black and white American citizens ride in separate railroad cars. The majority of the Supreme Court held that the Fourteenth Amendment allowed Louisiana to do so. The first Justice Harlan disagreed:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens

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<sup>4</sup> *Id.*

<sup>5</sup> *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948).

<sup>6</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

are equal before the law.<sup>7</sup>

In the second, *Lochner v. New York*,<sup>8</sup> the question was whether the State of New York could pass a law forbidding an employer to require that an employee work more than 60 hours per week. The majority of the Supreme Court held that the Fourteenth Amendment prevented New York from passing such a law. Justice Holmes disagreed:

This case is decided upon an economic theory which a large part of this country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.<sup>9</sup>

In the third, *Abrams v. United States*,<sup>10</sup> the question was whether the distribution of two dissident leaflets in New York City during World War I by self-described anarchists was a crime under the federal Espionage Act. The majority of the Supreme Court held that it was. Justice Holmes, joined by Justice Brandeis, disagreed:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>11</sup>

In the fourth, *Olmstead v. United States*,<sup>12</sup> the question was whether

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<sup>7</sup> *Id.*

<sup>8</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>9</sup> *Id.*

<sup>10</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>11</sup> *Id.*

<sup>12</sup> *Olmstead v. United States*, 277 U.S. 438, 479-80 (1928) (Brandeis, J., dissenting), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

evidence obtained by illegal wiretapping by the Government was admissible in a criminal prosecution. The majority of the Court held that it was admissible. Justice Brandeis disagreed:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

... By the laws of Washington, wire-tapping is a crime. To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue.<sup>13</sup>

Finally, in *Baker v. Carr*,<sup>14</sup> the question was whether a claim under the Equal Protection Clause of the Fourteenth Amendment brought by voters whose voting districts were malapportioned, and whose votes therefore counted less than those of voters in other districts, presented a political question beyond the competence of the federal courts. The majority of the Court held that this was not a political question. Justice Frankfurter disagreed:

Even assuming the indispensable intellectual disinterestedness on the part of judges in [reviewing apportionment schemes], they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omniscience to judges.<sup>15</sup>

Five critically important Supreme Court cases, five dissents. The first four have become law, or at least mostly so. *Plessy* was overruled in 1954 in *Brown v. Board of Education*.<sup>16</sup> *Lochner* and substantive economic due process were repudiated by the Roosevelt Court in the late 1930s.<sup>17</sup> *Abrams* has been mostly overruled,<sup>18</sup> although sometimes —

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<sup>13</sup> *Id.*

<sup>14</sup> *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

<sup>15</sup> *Id.*

<sup>16</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>17</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>18</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 451-52 (1969).

particularly in wartime or near-wartime, as in *Abrams* itself — it seems to revive. *Olmstead* was overruled in 1961 in *Mapp v. Ohio*,<sup>19</sup> and evidence seized in violation of the Fourth Amendment is now inadmissible in a criminal prosecution.

The last dissent has not become law. *Baker v. Carr* has not been overruled. Instead, it has become an 800-pound gorilla, requiring one person-one vote in every corner of our country except in the United States Senate.<sup>20</sup> Even apportionment plans for state senates that were modeled after the United States Senate, with two senators for each county regardless of population, have been struck down.<sup>21</sup> One might ask whether *Baker v. Carr* has been a good thing — do we like frequent reapportionment (and partisan gerrymanders); do we like safe seats on both sides of the aisle, such that the only challenger an elected official is likely to face will be from the far left or the far right of his or her own party; do we like the extreme partisanship thereby produced in our legislatures; do we like term limits, which sacrifice good, experienced politicians because we feel we have no other way getting rid of a bad politicians who hold safe seats? Should we have listened to Justice Frankfurter?

In these cases, the Justices have been our secular prophets, interpreting the central text of our civic faith, the United States Constitution. These Justices have pointed the way to our future, showing us what we and our government can and should become. This is a justly celebrated function — indeed, perhaps the most important function — of dissent in our judicial system.

But the function of dissent has changed over the years. The prophetic dissents are still there, though we are not in a position until sometime later fully to appreciate which dissents fall into this category. One of the reasons we may not be in a position to do this is that there are now so many dissents. Between 1789 to 1928, dissents and concurrences were filed in only 15% of all cases decided by the Supreme Court.<sup>22</sup> Between 1930 and 1957, dissents alone (not counting concurrences) were filed in 42% of all cases decided by the Court.<sup>23</sup> In October Term 1992, dissents alone were filed in 71% of all cases decided by the Court.<sup>24</sup>

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<sup>19</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>20</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>21</sup> *Reynolds*, 377 U.S. at 568.

<sup>22</sup> Evan A. Evans, *The Dissenting Opinion — Its Use and Abuse*, 3 MO. L. REV. 120, 138-41 (1938).

<sup>23</sup> Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 205 (1959).

<sup>24</sup> Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35.

Other functions of dissent are just as important — though perhaps not as dramatic — as the prophetic function just described. While declarations, or predictions, of high constitutional principle are important, so too is the workaday functioning of dissent.

First, somewhat paradoxically, a judge or justice may write a dissent in order not to have to write one. Sooner or later, all appellate judges have the experience of writing a draft dissent that ends up persuading the majority to his or her point of view. A number of Justice Brandeis's unpublished opinions were proposed dissents that performed this function.<sup>25</sup> Sometimes a draft dissent becomes the majority opinion before anything is published by the court, though a careful reader may discern signs that the published dissent had originally been written as the majority opinion.<sup>26</sup> Occasionally, a published dissent later becomes the published the majority opinion after rehearing by the court.<sup>27</sup>

Second, a dissent (or threatened dissent) may make the majority opinion better. A dissent may improve a majority opinion in many small ways. For example, a dissent may persuade the majority to change its description of the facts or some point of its analysis; the result is not changed, but the resulting majority opinion is a better piece of work. I confess that I have occasionally been tempted not to point out in a dissent all of the majority's mistakes, hoping that if they are left uncorrected the world at large will see the members of the majority for the misguided and ignorant creatures that they are (or at least, for the moment, that they seem to be). But I have resisted this unworthy impulse. I do so because I am not sure that I can trust the world at large to see, unaided, the majority's mistakes. More important, I do so because when the shoe is on the other foot, as it sometimes is, I want a dissenter to help me to improve my majority opinion.

A dissent can also help an opinion in large ways. This may sometimes be seen in cases where a dissent should have been, but was not, written. Justice Scalia has put it with characteristic directness: "Ironical as it may seem, I think a higher percentage of the worst opinions of my Court — not in result but in reasoning — are unanimous ones."<sup>28</sup> An example of Justice Scalia's point is *Bonelli Cattle Co. v. Arizona*,<sup>29</sup> in

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<sup>25</sup> ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* xx (1957).

<sup>26</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 541 (1977) (White, J., dissenting).

<sup>27</sup> See, e.g., *Brockmeyer v. May*, 361 F.3d 1222, 1229 (9th Cir. 2004) (Fletcher, J., dissenting), *withdrawn and replaced by* 383 F.3d 798 (9th Cir. 2004).

<sup>28</sup> Scalia, *supra* note 23, at 41.

<sup>29</sup> *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), *overruled by Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

which the Court held unanimously, in an opinion by Justice Marshall, that the “equal footing doctrine” required the Court to apply federal common law to determine title to land that had previously been at the bottom of the Colorado River. I think it fair to say that in *Bonelli Cattle* the Court as a whole cared little and knew less about the question it was deciding. Only three years later, in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*,<sup>30</sup> the Court reversed itself. Now educated by the amicus briefs of twenty-six unhappy states, the Court held that state law rather than federal common law governed questions of ownership of riverbottom land. Poor Justice Marshall, the author of *Bonelli Cattle*, was left almost alone in dissent.<sup>31</sup>

Third, a dissent can keep (or at least try to keep) the majority honest. Judges are not immune from the normal human temptation to ignore or to minimize inconvenient facts. A dissent can sometimes force the majority to acknowledge facts that work against the result favored by the majority. And if the dissent cannot force an acknowledgement, at least it can point out the dishonesty of the majority opinion. An example is *Demore v. Kim*,<sup>32</sup> in which Kim, a lawful permanent resident alien who came to this country from Korea at the age of six, was placed in deportation proceedings as a result of state court convictions for burglary and petty theft with priors. Immediately upon his release from prison at age twenty-one, he was placed in federal custody pending the outcome of his deportation proceeding. Under 8 U.S.C. § 1226(c), he was not entitled to bail during the course of the proceedings. The district court held the no-bail statute unconstitutional, and the Ninth Circuit agreed.<sup>33</sup> There was no contention that Kim was dangerous or that he was a serious flight risk. Pending the outcome of the litigation, the Immigration and Naturalization Service released Kim on a \$5,000 bond without requesting a bail hearing.

The Supreme Court upheld the constitutionality of the no-bail statute. Chief Justice Rehnquist wrote for the majority that Kim “conceded” that he was deportable,<sup>34</sup> and that the issue in the case was whether he could be detained without bail for the “brief period

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<sup>30</sup> *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

<sup>31</sup> *Id.* at 382 (Marshall, J., dissenting). Justice White joined Justice Marshall’s dissent. Justice Brennan declined to join the dissent, noting only that he would not overrule *Bonelli Cattle*. *Id.*

<sup>32</sup> *Demore v. Kim*, 538 U.S. 510 (2003).

<sup>33</sup> *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), *rev’d*, *Demore v. Kim*, 538 U.S. 510 (2003). In the interest of full disclosure, I note that I was the author of the Ninth Circuit opinion.

<sup>34</sup> *Demore v. Kim*, 538 U.S. at 514, 522 n. 6, and 531.



necessary”<sup>35</sup> to complete removal proceedings. The no-bail statute had a very different practical and constitutional consequence depending on the length of the detention. In concluding that the detention at issue was “brief” because of Kim’s “concession,” the Court made a hard case easy. But, in fact, the case was not easy. As the record made clear, Kim had made no such contention. He vigorously contested his deportation, and his deportation proceeding (and therefore his detention) were going to be lengthy. Justice Souter pointed out the Court’s misrepresentation of the record, politely calling it a mistake: “At the outset, there is the Court’s mistaken suggestion that Kim ‘conceded’ his removability. The Court cites no statement before any court conceding removability, and I can find none.”<sup>36</sup>

Fourth, a dissent can predict the legal and practical consequences of the majority opinion. Here, there are two schools of thought. Some judges like to point out in a parade of horrors all of the terrible consequences that will result from the majority’s decision. For example, in *Stone v. Powell*,<sup>37</sup> the Court held that a federal court cannot review on habeas corpus under 28 U.S.C. § 2254 a state court’s determination of the admissibility of evidence obtained through an allegedly unlawful search and seizure. Justice Brennan, in dissent, predicted that the Court’s decision would lead to an evisceration of federal habeas for state prisoners on all federal constitutional claims that are not “guilt-related.”<sup>38</sup> This approach has its dangers, for by pointing out the dire consequences the dissent may increase the likelihood that they occur. Other judges prefer to leave the dire consequences unstated, and if possible to concur in the judgment, while making clear the narrowness of the majority’s holding. Justice Stewart was particularly fond of this technique.<sup>39</sup>

Fifth, a dissent makes clear to the losing party or parties that their arguments were heard and understood. A close-to-home example for me is *Lutwak v. United States*.<sup>40</sup> The issue was whether marriages under the federal War Brides Act were fraudulent. After World War II, a woman legally in the United States arranged for her two brothers, European Jews

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<sup>35</sup> *Id.* at 513.

<sup>36</sup> *Id.* at 541 (Souter, J., dissenting).

<sup>37</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>38</sup> *Id.* at 517-18 (Brennan, J., dissenting) (“I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims — for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures — that this Court later decides are not ‘guilt-related.’”).

<sup>39</sup> See, e.g., *Citizens & S. Nat’l Bank v. Baugus*, 434 U.S. 35, 45 (1977) (Stewart, J., concurring).

<sup>40</sup> *Lutwak v. United States*, 344 U.S. 604 (1953).

who had survived the Holocaust, to marry women who had served in the American military during the war. If valid, the marriages permitted the two men to immigrate to the United States. The government brought a criminal prosecution against the woman and her brothers, charging that the marriages were fraudulent. The issue before the Supreme Court was whether the marital privilege protected the defendants from the introduction of testimony by the women to whom the men were purportedly married. The Court held that the testimony was admissible, despite a powerful dissent by Justice Jackson, joined by Justices Black and Frankfurter.<sup>41</sup> The defendants were convicted and served time in federal prison. The woman was the grandmother of a college roommate and close friend. While my friend would have preferred for the Court to come out the other way, Justice Jackson's dissent gives him comfort, even some satisfaction. Three Justices heard, and understood, the argument made on behalf of his grandmother. I often think of this case when I write dissents.

Sixth, a dissent can call for law reform by the legislature. A recent example is *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>42</sup> decided by the Supreme Court in 2007. Lilly Ledbetter worked for Goodyear between 1979 and 1998. She was the only woman "area manager" at her plant, and was paid substantially less than her male counterparts. The Court held that the 180-day statute of limitations for sex-based discrimination under Title VII began to run when an allegedly unlawful difference in payment occurred, with the result that when Ledbetter finally discovered that she had been paid less than her male counterparts, she could recover damages only for the 180 days before she filed suit. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, vigorously dissented. Justice Ginsburg explicitly called for legislative corrections of the "Court's parsimonious reading of Title VII."<sup>43</sup> Ms. Ledbetter spoke at the Democratic Convention in the summer of 2008, arguing for a change in the law (as well as for a change in administrations). The new Congress responded with the Lilly Ledbetter Fair Pay Act of 2009, which expressed disapproval of the Court's *Ledbetter* decision and amended Title VII and related antidiscrimination laws to allow recovery of up to two years' back pay.<sup>44</sup>

Seventh, a dissent can appeal to the judgment of other judges. A dissenting federal appellate judge may appeal to his or her colleagues to

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<sup>41</sup> *Id.* at 620 (Jackson, J., dissenting).

<sup>42</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007).

<sup>43</sup> *Id.* at 127 S. Ct. 2162, 2188 (Ginsburg, J., dissenting).

<sup>44</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

take a case en banc because of disagreement with the majority's decision.<sup>45</sup> Or a judge may concur in the opinion (or the judgment) of his or her colleagues, while making clear that he or she disagrees with an earlier decision of the court that binds the panel on which the judge sits.<sup>46</sup> The audience for such a dissent is the active judges of the circuit, who by majority vote can decide to rehear the case en banc. If a case is taken en banc, the decision of the three-judge panel can be overridden — either because the en banc court holds the panel decision was wrong under existing law, or because the en banc court reverses earlier circuit authority that bound the panel. If an appellate judge has tried unsuccessfully to convince his or her colleagues to take a panel decision en banc, that judge may write a dissent from the failure to go en banc. Such a dissent is the functional equivalent of a petition for certiorari, but written by a judge instead of a party. Some are successful,<sup>47</sup> but most are not.<sup>48</sup>

Finally, a dissent can appeal to the judgment of a later time. This brings us full circle to the famous, and prophetic, dissents with which I began. Golden Gate University Law School is justly proud to count among its alumni Justice Carter, a dissenter in this proud tradition.

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<sup>45</sup> See, e.g., *Vasquez v. Astrue*, 547 F.3d 1101, 1114 (9th Cir. 2008) (O'Scannlain, J., dissenting).

<sup>46</sup> See, e.g., *United States v. Belgarde*, 300 F.3d 1177, 1182 (9th Cir. 2002) (Gould, J., concurring).

<sup>47</sup> See, e.g., *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918 (9th Cir.) (Bea, J., dissenting from denial of rehearing en banc), *cert. granted*, 129 S. Ct. 30 (2008); *Musladin v. Lamarque*, 427 F.3d 647 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc), *vacated*, 549 U.S. 70 (2006).

<sup>48</sup> See, e.g., *S. Or. Barter Fair v. Jackson County*, 401 F.3d 1124 (9th Cir.) (Berzon, J., dissenting from denial of rehearing en banc), *cert. denied*, 546 U.S. 826 (2005); *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 210 F.3d 1098, 1099 (9th Cir.) (O'Scannlain, J., dissenting from denial of rehearing en banc), *cert. denied*, 531 U.S. 1010 (2000).